

UNITED STATES DISTRICT COURT

Northern District of California

San Francisco Division

EBAY INC., and MICROSOFT  
CORPORATION,

Plaintiffs, Counterclaim-Defendants

v.

KELORA SYSTEMS, LLC,

Defendant, Counterclaim-Plaintiff.

CABELA'S INC,

Plaintiff, Counterclaim-Defendant

v.

KELORA SYSTEMS, LLC,

Defendant, Counterclaim-Plaintiff.

KELORA SYSTEMS, LLC,

Plaintiff, Counterclaim-Defendant,

v.

TARGET CORPORATION;  
AMAZON.COM, INC.; DELL, INC.;  
OFFICE DEPOT, INC.; NEWEGG INC.;  
COSTCO WHOLESALE CORPORATION;  
HEWLETT-PACKARD COMPANY;  
AUDIBLE, INC.; and ZAPPOS.COM, INC.,

Defendants, Counterclaim-Plaintiffs.

**ORDER TAXING COSTS**

No. C 10-4947 CW (LB)

[ECF Nos. 173 to 175]

No. C 11-1398 CW (LB)

[ECF No. 155]

No. C 11-1548 CW (LB)

[ECF Nos. 515 to 521]

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## INTRODUCTION

Kelora is the losing party in three related patent infringement cases. The district court granted summary judgment in favor of, and ordered recovery of costs for, the prevailing parties: (I) eBay and Microsoft in case number C 10-4947 CW (the “eBay case”), (II) Cabela’s in case number C 11-1398 CW (the “Cabela’s case”), and (III) Target, Amazon.com, Audible, Zappos.com, Dell, Office Depot, Newegg, Costco, and Hewlett-Packard (“HP”) in case number C 11-1548 CW (the “Target case”). *See* Amended Judgment, No. C 10-4947 CW, ECF No. 158. The district court referred the challenges to the clerk’s taxing of costs to this court “for adjudication.” ECF No. 180. The following table summarizes the taxed costs, the parties’ positions now, and the court’s awards.

| Case         | Party                       | Clerk Taxed  | Prevailing Party’s Position | Kelora’s Position | Total Amt. Awarded |
|--------------|-----------------------------|--------------|-----------------------------|-------------------|--------------------|
| 10-4947      | eBay                        | \$181,765.04 | \$185,588.04                | \$19,298.79       | \$103,473.04       |
|              | Microsoft                   | \$30,954.27  | \$34,777.27                 | \$12,876.54       | \$30,909.82        |
| 11-1398      | Cabela’s                    | \$29,682.55  | \$29,682.55                 | \$9,234.75        | \$28,552.20        |
| 11-1548      | Dell                        | \$20,082.16  | \$20,082.16                 | \$2,697.75        | \$20,082.16        |
|              | Newegg                      | \$28,304.80  | \$28,304.80                 | \$12,346.70       | \$28,304.80        |
|              | Amazon<br>Audible<br>Zappos | \$101,312.38 | \$101,312.38                | \$11,512.29       | \$28,257.39        |
|              | Costco                      | \$35,213.17  | \$35,213.17                 | \$8,225.93        | \$12,777.97        |
|              | HP                          | \$79,730.30  | \$79,730.30                 | \$9,510.50        | \$61,824.40        |
|              | Office<br>Depot             | \$29,037.75  | \$29,037.75                 | \$6,036.05        | \$21,102.48        |
|              | Target                      | \$8,454.16   | \$8,454.16                  | \$7,769.30        | \$8,454.16         |
| <b>TOTAL</b> |                             | \$544,536.58 | \$552,182.58                | \$99,508.60       | \$343,738.42       |

## STATEMENT

### I. THE AMOUNTS REQUESTED

The prevailing parties filed bills of costs for categories that included filing fees, service fees, transcripts, witnesses, printing, and exemplification and copying. *See* Bills of Costs, eBay Case, ECF Nos. 159-60, Cabela’s Case, ECF No. 150, and Target Case, ECF Nos. 487-93. The clerk awarded costs that included e-discovery costs as “fees for exemplification and the costs of making

copies” under 28 U.S.C. § 1920(4). Kelora, eBay, and Microsoft timely challenged the awards within seven days under Federal Rule of Civil Procedure 54(d). The chart shows this information.

| Case    | Party                       | Bill of Costs   | Costs Taxed by Clerk                     | Kelora’s Motion to Review | Prevailing Party’s Motion to Review |
|---------|-----------------------------|---|--|---------------------------|-------------------------------------|
| 10-4947 | eBay                        | \$187,158.26<br>ECF 159<br>(6/6/12)                         | \$181,765.04<br>ECF No. 172<br>(7/20/12) | ECF No. 174<br>(7/26/12)  | ECF No. 175<br>(7/27/12)            |
|         | Microsoft                   | \$37,420.74<br>ECF No. 160<br>(6/6/12)                      | \$30,954.27<br>ECF No. 171<br>(7/20/12)  | ECF No. 173<br>(7/26/12)  | ECF No. 175<br>(7/27/12)            |
| 11-1398 | Cabela’s                    | \$32,276.11<br>ECF Nos. 132,<br>150 (6/6/12 and<br>8/13/12) | \$29,682.55<br>ECF No. 153<br>(10/10/12) | ECF No. 155<br>(10/17/12) | N/A                                 |
| 11-1548 | Dell                        | \$21,551.79<br>ECF No. 487<br>(6/6/12)                      | \$20,082.16<br>ECF No. 508<br>(7/19/12)  | ECF No. 518<br>(7/26/10)  | N/A                                 |
|         | Newegg                      | \$31,161.09<br>ECF No. 488<br>(6/6/12)                      | \$28,304.80<br>ECF No. 509<br>(7/19/12)  | ECF No. 520<br>(7/26/10)  | N/A                                 |
|         | Amazon<br>Audible<br>Zappos | \$102,866.46<br>ECF No. 489<br>(6/6/12)                     | \$101,312.38<br>ECF No. 510<br>(7/19/12) | ECF No. 517<br>(7/26/10)  | N/A                                 |
|         | Costco                      | \$35,805.34<br>ECF No. 490<br>(6/6/12)                      | \$35,213.17<br>ECF No. 511<br>(7/19/12)  | ECF No. 516<br>(7/26/10)  | N/A                                 |
|         | HP                          | \$81,965.14<br>ECF No. 491<br>(6/6/12)                      | \$79,730.30<br>ECF No. 512<br>(7/19/12)  | ECF No. 519<br>(7/26/10)  | N/A                                 |
|         | Office<br>Depot             | \$29,629.92<br>ECF No. 492<br>(6/6/12)                      | \$29,037.75<br>ECF No. 513<br>(7/19/12)  | ECF No. 521<br>(7/26/10)  | N/A                                 |
|         | Target                      | \$9,028.99<br>ECF No. 493<br>(6/6/12)                       | \$8,454.16<br>ECF No. 507<br>(7/19/12)   | ECF No. 515<br>(7/26/10)  | N/A                                 |
|         |                             |   |  |                           |                                     |

## II. PROCEDURAL HISTORY

Kelora filed ten motions for review generally on the ground that the prevailing parties should not recover e-discovery costs as exemplification and copying costs under section 1920(4). *See generally*

Kelora's Motions. The district court referred the motions to this court for adjudication. *See* Order, eBay case, ECF No. 180. The court held a hearing on April 4, 2013.

### ANALYSIS

The parties dispute (I) their respective legal burdens to establish the sufficiency of the documentation for the itemized costs and (II) the specific itemized costs.

#### I. LEGAL STANDARDS

##### A. Awarding Costs To A Prevailing Party Generally

"Unless a federal statute, these rules, or a court order provides otherwise, costs – other than attorney's fees – should be allowed to the prevailing party." Fed. R. Civ. P. 54(d)(1). This rule "creates a presumption in favor of awarding costs to a prevailing party." *Ass'n of Mexican-Am. Educators v. State of Cal.*, 231 F.3d 572, 591 (9th Cir. 2000). The losing party has the burden of overcoming the presumption by affirmatively showing that the prevailing party is not entitled to costs. *See Save Our Valley v. Sound Transit*, 335 F.3d 932, 944-45 (9th Cir. 2003).

A district court has discretion to deny costs, but it must specify its reasons for doing so. *Ass'n of Mexican-Am. Educators*, 231 F.3d at 591-92. Examples of reasons that support denying costs include some impropriety on the part of the prevailing party (including misconduct or bad-faith practices), a nominal recovery, a losing party's indigence or limited financial resources, whether the issues in the case were close or difficult, a chilling effect on civil rights plaintiffs of modest means, and whether the case presented a landmark issue of national importance. *See id.* at 592; *see also Quan v. Computer Sciences Corp.*, 623 F.3d 870, 888-89 (9th Cir. 2010); *Stanley v. Univ. of S. Cal.*, 178 F.3d 1069, 1079 (9th Cir. 1999); *Competitive Techs. v. Fujitsu Ltd.*, No. C-02-1673 JCS, 2006 WL 6338914, at \*3 (N.D. Cal. Aug. 23, 2006). Inflated costs sometimes result in "diminished award[s]" and sometimes result in denying of taxable costs altogether. *See, e.g., Jansen v. Packaging Corp. of America*, 898 F. Supp. 625, 629 (N.D. Ill. 1995).

Unless otherwise authorized by statute or contract, 28 U.S.C. § 1920 limits the costs that a court may award under Rule 53(d) to the following:

(1) Fees of the clerk and marshal;

(2) Fees for printed or electronically recorded transcripts necessarily obtained for use

1 in the case;

2 (3) Fees and disbursements for printing and witnesses;

3 (4) Fees for exemplification and the costs of making copies of any materials where  
4 the copies are necessarily obtained for use in the case;

5 (5) Docket fees under section 1923 of this title; [and]

6 (6) Compensation of court appointed experts, compensation of interpreters, and  
7 salaries, fees, expenses, and costs of special interpretation services under section  
8 1828 of this title.

8 N.D. Cal. Civil Local Rule 54-3 provides guidance regarding the taxable costs in each category.

9 A bill of costs “must state separately and specifically each item of taxable costs claimed.” Civ.  
10 L.R. 54-1(a). A party seeking costs must provide an affidavit saying that the costs were “necessarily  
11 incurred, and are allowable by law” and “[a]ppropriate documentation to support each item claimed  
12 must be attached to the bill of costs.” *Id.* “With regard to individual itemized costs, ‘the burden is  
13 on the party seeking costs . . . to establish the amount of compensable costs and expenses to which it  
14 is entitled.’” *City of Alameda v. Nuveen Mun. High Income Opportunity Fund*, No. C 08-4575 SI,  
15 2012 WL 177566, at \*1 (N.D. Cal. Jan. 23, 2012) (quoting *Allison v. Bank One-Denver*, 289 F.3d  
16 1223, 1248-49 (10th Cir. 2002)). The court reviews de novo the clerk’s taxation of costs. *See Lopez*  
17 *v. San Francisco Unified School Dist.*, 385 F. Supp. 2d. 981, 1001 (N.D. Cal. 2005).

18 **B. The Burden Under 28 U.S.C. § 1920**

19 The parties disagree about who has to show whether the documentation of costs is sufficient.  
20 The reason that the parties argue about this is that the processing costs for electronically-stored  
21 information (“ESI”) are relatively high, and the parties think that the result about whether Kelora has  
22 to pay might vary depending on who has responsibility for establishing (or challenging) the  
23 sufficiency of the documentation.

24 The prevailing parties argue that Kelora must justify denial of each line item on their e-discovery  
25 invoice. The court disagrees. A prevailing party must itemize its costs with enough detail to  
26 establish that they are taxable under section 1920. ESI does not change this, as the undersigned  
27 already held in *Plantronics, Inc. v. Aliph, Inc.*. *See* No. C 09-01714 WHA (LB), 2012 WL 6761576,  
28 at \*3 (N.D. Cal. Oct. 23, 2012) (taxing costs for TIFF conversion, OCR, electronic scanning and

conversion to PDF, image endorsement, and electronic reproduction to media; did not tax data processing costs); *Oracle Am., Inc. v. Google, Inc.*, No. C 10-03561 WHA, 2012 WL 3822129, at \*3 (N.D. Cal. Sept. 4, 2012); *City of Alameda*, 2012 WL 177566, at \*1; *accord In re Ricoh Co. Patent Litig.*, 661 F.3d 1361, 1368 (Fed. Cir. 2011) (applying Ninth Circuit law and denying disputed copying costs to a prevailing party that “did not meet its burden under section 1920 to establish the amount of costs to which it is entitled,” and noting the inadequacy of “generic references such as ‘transcripts,’ ‘publication,’ and ‘document production’”) (quoting *Fabi Constr. Co. v. Sec’y of Labor*, 541 F.3d 407, 414 (D.C. Cir. 2008)); *Competitive Techs.*, 2006 WL 6338914, at \*3 (same).

*Save Our Valley* does not change this outcome or excuse a prevailing party from providing that its costs are taxable. There, the Ninth Circuit held only that a district court does not need to give affirmative reasons for awarding costs to the prevailing party and needs to find that the reasons for denying costs are not sufficiently persuasive to overcome the presumption for an award. *See* 335 F.3d at 945. Still, as discussed above, a court has to specify its reasons for denying costs. *Ass’n of Mex-Am Educators*, 231 F.3d at 591.

As to what is the “appropriate documentation” of costs that a party must submit under Civil Local Rule 54-1(a), it varies depending on the case. In a simple case with obvious costs, invoices may not be needed, and a counsel’s declaration might be enough. *See Chellino v. Kaiser Found. Health Plan*, C 07-03019 CRB, 2010 WL 583970, at \*6 (N.D. Cal. Feb. 16, 2010) (awarding \$921.75 in copying costs; no invoices required; “[t]here is no explicit requirement that counsel attach invoices”); *Meier v. U.S.*, No. C 05-04404 WHA, 2009 WL 982129, at \*2 (N.D. Cal. Apr. 13, 2009) (\$500 in copying costs; no invoices; costs identified in declaration attached to the bill of costs). By contrast, in a large case with ESI, more substantial documentation might be appropriate. For example, in *In re Ricoh*, a patent infringement case with close to one million dollars in costs, the Federal Circuit, applying Ninth Circuit law, ruled that “invoices and [an] itemized spreadsheet . . . were not specific enough to permit the taxation of . . . costs” because they contained generic statements such as “[d]ocument production.” 661 F.3d at 1368. Vague documentation meant that the reviewing court could not determine what documents were being produced and to what party. *Id.* Thus, “a bill of costs must represent a calculation that is reasonably accurate under the

1 circumstances.” *Id.* (internal quotation omitted).

2 In *Oracle America v. Google*, the court required “an itemized list with sufficient specificity”  
3 from the party seeking three million dollars in costs. 2012 WL 3822129, at \*3. Similarly, in  
4 *Plantronics*, this court considered *In re Ricoh* and *Oracle* and determined that the prevailing party  
5 had failed to itemize its “e-discovery processing costs with sufficient detail to establish that the court  
6 should award it any of the ESI processing costs.” 2012 WL 6761576, at \*3, \*17.

7 In sum, with ESI, vaguely-worded vendor invoices and a declaration that such services were  
8 necessarily incurred may not satisfy the prevailing party’s burden to show that the ESI is the  
9 electronic equivalent of compensable exemplification and copying. That being said, the inquiry is  
10 case-specific. Invoices can give sufficient detail. This is just another way of saying that the parties  
11 seeking costs are required to provide “enough detail to establish that each expense is taxable under  
12 section 1920.” *Plantronics*, 2012 WL 6761576, at \*3; *accord Oracle Am.*, 2012 WL 3822129, at \*3;  
13 *City of Alameda*, 2012 WL 177566, at \*1; *In re Ricoh*, 661 F.3d at 1368.

#### 14 **C. Whether Costs for E-Discovery are Taxable Under 28 U.S.C. § 1920(4)**

15 Under section 1920(4), the court may tax “fees for exemplification and the costs of making  
16 copies of any materials where the copies are necessarily obtained for use in the case.” Congress  
17 amended section 1920 in 2008 to substitute “the costs of making copies of any materials” for “the  
18 costs of copies of papers.” That pulled the electronic equivalent of papers into the arena of  
19 compensable costs under section 1920(4).

20 The local rule interprets the statute to provide “[t]he cost of reproducing disclosure or formal  
21 discovery documents when used for any purpose in the case.” Civ. L.R. 54-3(d)(2). Taxable costs  
22 of copying client documents include the costs of collecting documents, reviewing those documents,  
23 and determining which are relevant. *Parrish v. Manatt, Phelps & Phillips, LLP*, C 10-03200 WHA,  
24 2011 WL 1362112, at \*2 (N.D. Cal. Apr. 11, 2011) (the process often is costly but the costs  
25 nonetheless are taxable). Not all costs attributable to producing discovery are recoverable. For  
26 example, copies made solely for counsel’s convenience or the litigant’s own use are not recoverable  
27 because they are not “necessarily” obtained for use in the case. *Haroco, Inc. v. American Nat’l Bank*  
28 *& Trust Co. of Chicago*, 38 F.3d 1429, 1441 (7th Cir. 1994); *Computer Cache Coherency Corp. v.*



*Intel Corp.*, C-05-01766 RMW, 2009 WL 5114002, at \*4 (N.D. Cal. Dec. 18, 2009); *Competitive Techs.*, 2006 WL 6338914, at \*8 (finding that multiple sets of copies were made for the attorney's convenience and therefore non-compensable). Similarly, "intellectual efforts" involved in the production of discovery – including "the research, analysis, and distillation of data incurred in the preparation of documents (as oppose[d] to the cost of physically preparing the documents)" – are not taxable costs. *Oracle Am.*, 2012 WL 3822129, at \*3 (citation omitted); *accord Romero v. Pomona*, 883 F.2d 1418, 1428 (9th Cir. 1989) ("fees are permitted only for the physical preparation and duplication of documents, not the intellectual effort involved in their production."), *overruled in part on other grounds in Townsend v. Holman Consulting Corp.*, 914 F.2d 1136, 1141 (9th Cir. 1990).

The issue here is what kinds of costs attributable to producing ESI are analogous to "exemplification and the costs of making copies" (and not for the parties' convenience or attributable to "intellectual effort" involved in document production) such that they are taxable under section 1920(4). To illustrate the arguments in the context of specific e-discovery categories, the court starts with summaries of the costs bills in the eBay/Microsoft case (C 10-4947) and analyzes whether those costs are taxable. After that, the court addresses the other prevailing party submissions seriatim.

**D. Costs: Case No. C 10-4947 (eBay and Microsoft)**

These two tables show the clerk's taxed costs, the parties' positions, and the court's awards.

| <b>eBay Costs By Category, Parties' Positions, and Award</b> (* denotes an undisputed cost) |                    |                        |                          |                    |
|---|--------------------|------------------------|--------------------------|--------------------|
| <b>§ 1920 Category</b>  | <b>Taxed Costs</b> | <b>eBay's Position</b> | <b>Kelora's Position</b> | <b>Court Award</b> |
| Fees of the clerk*  | \$1,350.00         | \$1,350.00             | \$1,350.00               | \$1,350.00         |
| Service of summons and subpoenas*   | \$491.61           | \$491.61               | \$491.61                 | \$491.61           |
| Fees for printed or electronically recorded transcripts                                     | \$16,204.91        | \$20,027.91            | \$16,204.91              | \$20,027.91        |
| Fees for printing*  | \$194.00           | \$194.00               | \$194.00                 | \$194.00           |
| Fees for witnesses*   | \$1,058.27         | \$1,058.27             | \$1,058.27               | \$1,058.27         |
| Fees for exemplification and the costs of making copies                                     | \$162,466.25       | \$162,466.25           | \$0.00                   | \$80,351.25        |

|       |              |              |             |              |
|-------|--------------|--------------|-------------|--------------|
| Total | \$181,765.04 | \$185,588.04 | \$19,298.79 | \$103,473.04 |
|-------|--------------|--------------|-------------|--------------|

**Microsoft Costs By Category, Parties' Positions, and Award** (\* denotes an undisputed cost)

| § 1920 Category   | Taxed Costs | Microsoft's Position | Kelora's Position | Court Award |
|---|-------------|----------------------|-------------------|-------------|
| Fees of the clerk*                                      | \$1,350.00  | \$1,350.00           | \$1,350.00        | \$1,350.00  |
| Service of summons and subpoenas*                       | \$491.61    | \$491.61             | \$491.61          | \$491.61    |
| Fees for printed or electronically recorded transcripts | \$9,976.66  | \$13,799.66          | \$9,976.66        | \$13,799.66 |
| Fees for witnesses*                                     | \$1,058.27  | \$1,058.27           | \$1,058.27        | \$1,058.27  |
| Fees for exemplification and the costs of making copies | \$18,077.73 | \$18,077.73          | \$0.00            | \$14,210.28 |
| Total   | \$30,954.27 | \$34,777.27          | \$12,876.54       | \$30,909.82 |

Combined Opp'n Exs. D & E, eBay Case, ECF No. 181-1. Kelora has two challenges: (1) the e-discovery costs are not taxable because they are pre-copying processing, are not substantiated by adequate documentation, or were not for documents actually produced to Kelora; and (2) eBay and Microsoft should get stenographic transcripts or the video deposition but not both. Motions, eBay case, ECF Nos. 173 and 174; Opp'n, ECF No. 178.

***1. Recoverability of E-discovery Costs Generally***

The issue is whether the e-discovery costs are taxable under section 1920(4) as an electronic "exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case." The tables show the categories and the court's awards (in bold).

**eBay Exemplification Costs By Category**

| Item             | Description   | Total Cost         |
|------------------|---|--------------------|
| Production Media | Cost of hard drives used to deliver imaged copies of relevant eBay documents and associated metadata as requested by Kelora. This cost is analogous to the paper cost for printed copies. | <b>\$ 1,200.00</b> |

|    |                         |  |                      |
|----|-------------------------|--|----------------------|
| 1  | Production Setup        | Cost of assembling, ordering, tagging, and QA for document release to Kelora. <i>Includes the creation of metadata load files as requested by Kelora and image “placeholders” for documents and ESI that the requesting party asked to receive in native format.</i>   | \$ 43,500.00         |
| 2  | Production Imaging      | Cost of feeding assembled documents into an image printer for the creation of image copies of those documents to the requesting party. The cost includes imaging, de-blanking, bates stamping, assignment of protective orders and confidentiality designations, insertion of slip sheets, and native file place holders, image quality QA and final export to production media. | \$ 22,450.00         |
| 3  | Source Code             | [Cost of] isolating and presenting eBay source code on a secure and locked down machine in anticipation of inspection by the requesting party.   | \$ 1,800.00          |
| 4  | Forensic Copy           | GGO used forensic best practices to acquire eBay data and preserve eBay hard drive images to create official certified copies of the most responsive documents and the most important deponents.   | \$ 1,600.00          |
| 5  | Nonstandard acquisition | GGO used forensic tools to acquire eBay data and preserve eBay Wiki-based and MS Share Point-based server data to create official copies of the most responsive documents.   | \$ 8,170.00          |
| 6  | Client Collection       | GGO used forensically sound copying tools to acquire eBay data and preserve eBay email, and other documents to create official certified copies of all potentially responsive documents.   | \$ 44,000.00         |
| 7  | Pre-Process Data        | GGO used MD5 Hash and SHA1 file fingerprinting algorithms to certify the integrity of each document at the time of preservation . . . . Documents such as movie files and database files were isolated and subjected to pre-processing for ultimate production as non-standard files.  | \$ 1,631.25          |
| 8  | Filter Post for Review  | GGO collected and preserved certified copies of documents in 24 batch collections on at least 24 separate occasions. Each batch of collected and preserved documents was searched based on relevancy filters, date ranges, and keywords. The cost of isolating potentially relevant documents creating production draft sets, and recording all activities and logic.            | \$ 24,000.00         |
| 9  | Data Mining             | Use of experts & analytical tools to id terms, concepts, and people that may be responsive but weren’t contemplated in initial response filters of key word searches.  | \$ 14,115.00         |
| 10 | <b>Total</b>            |  | <b>\$ 162,466.25</b> |

| <b>Microsoft Exemplification Costs By Category</b> |  |                   |
|--|--|-------------------|
| <b>Item</b>  | <b>Description</b>   | <b>Total Cost</b> |
| Lighthouse Inv. No.<br>0102213                     | Index & Keyword Search Terms (\$2,420.25)<br>Native/Near-Native Export ( <b>\$1,272.00</b> )<br>Technical Project management ( <b>\$240.00</b> )   | \$3,932.25        |
| Lighthouse Inv. No.<br>0102224                     | Technical Project management   | <b>\$60.00</b>    |
| Lighthouse Inv. No.<br>0102289                     | Custom case setup/Modification   | <b>\$75.00</b>    |
| Lighthouse Inv. No.<br>0102326                     | Index & Keyword Search Terms (\$1,447.25)<br>Native/Near-Native Export ( <b>\$876.00</b> )<br>Image Export ( <b>\$120.00</b> )<br>Technical Project management ( <b>\$720.00</b> )   | \$3,163.25        |
| Lighthouse Inv. No.<br>0102477                     | Technical Project management   | <b>\$96.00</b>    |
| Lighthouse Inv. No.<br>0102511                     | Technical Project management   | <b>\$60.00</b>    |
| Lighthouse Inv. No.<br>0102527                     | File conversion native to TIFF ( <b>\$1.01</b> ); Technical Management ( <b>\$204.00</b> ); Image Export ( <b>\$168.00</b> )   | <b>\$373.01</b>   |
| Lighthouse Inv. No.<br>0102557                     | File conversion native to TIFF ( <b>\$783.60</b> );<br>Electronic bates number ( <b>\$208.96</b> ); Image export ( <b>\$636.00</b> ); Technical Project management ( <b>\$708.00</b> ); DVD mastering ( <b>\$10.00</b> );<br>Shipping/courier charges ( <b>\$30.62</b> )   | <b>\$2,377.18</b> |
| Lighthouse Inv. No.<br>0102633                     | Draft: Case planning & mgmt ( <b>\$36.00</b> )<br>Analyze: Data analysis & cons ( <b>\$96.00</b> )<br>Analyze: Final check ( <b>\$120.00</b> )<br>Create: Database administration ( <b>\$156.00</b> )<br>Load: Database administration ( <b>\$240.00</b> )<br>Load: Review support ( <b>\$36.00</b> )<br>Image processing ( <b>\$264.00</b> )<br>Export customization ( <b>\$384.00</b> )<br>Standard iQC ( <b>\$182.50</b> )<br>iQC Final Check ( <b>\$60.00</b> )<br>Deliverable QA ( <b>\$312.00</b> )<br>Internal quality check ( <b>\$216.00</b> )<br>Custom strategy doc/work plan ( <b>\$24.00</b> )<br>File conversion native to TIFF ( <b>\$1,219.00</b> )<br>Electronic bates number/POD ( <b>\$325.28</b> )<br>Shipping/courier:( <b>\$32.38</b> ); Sales tax ( <b>\$3.08</b> ) | <b>\$3,707.04</b> |
| Lighthouse Inv. No.<br>0102758                     | Analyze: Data analysis & cons  | <b>\$216.05</b>   |

|  |  |                    |
|--|--|--------------------|
| Lighthouse Inv. No.<br>0102964           | Native conversion to TIFF/PDF (\$81.95)<br>Electronic Bates number/POD (\$21.85)<br>Index & keyword search (\$103.25)<br>DVD mastering (\$20.00)<br>Advanced case planning & mgmt (\$96.00)<br>Native productions (\$60.00)<br>Case planning & mgmt (\$228.00)<br>Data analysis & consulting (\$180.00)<br>Data analysis reports (\$36.00)<br>Database administration (\$120.00)<br>Advanced coding (\$60.00)<br>Deliverable QA (\$552.00)<br>File text extraction (\$96.00)<br>Image check/reformatting (\$10.00)<br>Native export (\$516.00)<br>Image Export (\$60.00) | \$2,241.05         |
| Lighthouse Inv. No.<br>0103042           | Hard drives up to 250 GB (\$400.00)<br>Advanced Case Planning & Mgmt. (\$60.00)<br>Case Planning & Management (\$60.00)<br>Deliverable QA (\$156.00)   | \$714.00           |
| Lighthouse Inv. No.<br>0103115           | Data Analysis & Consulting (\$120.00)<br>Shipping/courier charges (\$139.68)   | \$272.95           |
| Document Technologies Inv.<br>No. 619030 | Copy of Microsoft (Kelora) source code (\$540.00)<br>Hard Drive Media (\$250.00)   | \$790.00           |
| <b>Total</b>                             |  | <b>\$18,077.78</b> |

Combined Opp'n Exs. D and E, eBay Case, ECF No. 181-1.

Even before the 2008 substitution in section 1920(4) of “costs of making copies of any materials” to “costs of making copies,” courts recognized that electronic copying (such as scanning) can be taxed under section 1920(4). *See Plantronics*, 2012 WL 6761576, at \*12 (collecting cases). Applying that reasoning, this court held in *Plantronics* that “exemplification” includes scanning and converting electronically-stored files in native format to ADOBE or TIFF format. *Id.* The court also awarded costs for ancillary tasks that are common to electronic or paper discovery, including Bates stamping (including electronic Bates stamping), putting information on media such as a CD, DVD, or hard drive, and putting slipsheets or a marker to establish document breaks. *Id.* (collecting and analyzing cases). Without this organization, any copy is relatively useless.<sup>1</sup>

<sup>1</sup> As the court observed in *Plantronics*, documents come in all sorts of formats, including paper, scanned documents, and native files. *Id.* at \*13. Yesterday’s “necessary” paper document can be supplanted by today’s email that is produced with extracted metadata that gives necessary

1 The *Plantronics* order also reached the conclusion that other collection and processing costs  
 2 ordinarily are not compensable under 1920(4) and instead are non-taxable costs that are either (a)  
 3 for the convenience of the parties or (b) akin to “intellectual effort” involved in the production of  
 4 documents or the research, analysis, and distillation of data. *See id.* at \*13-15 (analyzing cases).  
 5 Some costs might be compensable if they are part of the necessary efforts to make information  
 6 readable. *See Petroliaam Nasional Berhad v. GoDaddy.com, Inc.*, No. C 09-5939 PJH, 2012 WL  
 7 1610979, at \*4 (N.D. Cal. May 8, 2012) (allowing \$6,365.04 for work by technicians to convert  
 8 computer data into a readable format). This is why TIFF conversion is compensable. But often e-  
 9 gathering and e-processing costs are not the equivalent of the “physical preparation and duplication  
 10 of documents” that is compensable. *Plantronics*, 2012 WL 6761576, at \*14 (applying Judge  
 11 Alsup’s approach in *Oracle Am.*, 2012 WL 3822129, at \*3). Instead, they are analogous to the  
 12 gathering and processing costs and “intellectual effort” such as organizing, searching, and  
 13 analyzing discovery documents. *See id.* As Judge Alsup held in *Oracle America*, these expenses  
 14 are not taxable under section 1920(4). 2012 WL 3822129, at \*3.

15 *In re Ricoh* does not alter this conclusion. There, the court awarded costs that included hosting  
 16 services. 661 F.3d at 1364-66. The parties agreed, however, to native production (a cost that the  
 17 court also taxes here) and shared use of a vendor and division of costs. *Id.* Thus, the court awarded  
 18 the costs of the production. *Id.*

19 Applying this approach here means that costs recoverable for the following: scanning paper  
 20 documents, electronic scanning and conversion to PDF, TIFF conversion, OCR, image  
 21 endorsement/Bates stamping, slip sheet preparation, blowback scanning paper documents, media  
 22 hardware used for production, electronically stamping Bates numbers, slipsheet preparation,

23 \_\_\_\_\_  
 24 information about, for example, the date it was created. *Id.* Evolving technology can change what is  
 25 “necessarily obtained for use in the case” under section 1920(4). *See id.* Courts vary and evolve  
 26 about what they will tax as costs. *See id.* Some have treated scanning as “for the convenience of  
 27 counsel,” and others allow scanning and converting to TIFF format. *Id.* (*comparing Roehrs v.*  
 28 *Conesys, Inc.*, No. 3:05-CV-829-M (BH), 2008 WL 755187, at \*3 (N.D. Tex. Mar. 21, 2008)  
 (scanning is for the convenience of counsel), *with Race Tires America, Inc. v. Hoosier Racing Tire*  
*Corp.*, 674 F.3d 158, 166-169 (3d Cir. 2012) (allowed costs for scanning, converting to TIFF format,  
 and transferring from VHS to DVD)).



1 blowback preparation, and OCR conversion. Kelora does not dispute this approach (though it  
 2 disputes some costs that the court assesses). *See, e.g.,* Kelora Motion re: Costco costs, Target Case,  
 3 ECF No. 516 at 10 & Ex. 1. The court also taxes certain processing costs tied to specific  
 4 productions as part of the copying process, productions in agreed-to native format, and load files  
 5 necessary to read information. The costs are not limited to documents introduced into the record or  
 6 at a hearing or trial and instead are allowed for “the cost of reproducing disclosure or formal  
 7 discovery documents when used for any purpose in the case.” N.D. Cal. Civil L. R. 54-3(d). The  
 8 documents must have been prepared for or tendered to Kelora. *See U.S. ex rel. Meyer v. Horizon*  
 9 *Health Corp.*, C 00-1303 SBA, 2007 WL 518607, at \*5 (N.D. Cal. Feb. 13, 2007); *accord City of*  
 10 *Alameda*, 2012 WL 177566, at \*5; *Computer Cache*, 2009 WL 5114002, at \*3.

11 Before turning to a line-item scrutiny of the invoices, another issue is whether the parties’  
 12 agreement about the production of ESI changes this conclusion. As the *Plantronics* order points  
 13 out, the parties’ agreement about the form of production might militate in favor of imposing costs  
 14 on the non-prevailing party. 2012 WL 6761576, at \*15. The parties agreed to the following here:

15 The parties agree presumptively to produce non-source code documents in an electronic  
 16 format to be agreed upon (e.g. TIFF files with a Concordance compatible load file) and to  
 17 reasonably accommodate one another’s request for OCR and load-file information to allow  
 18 processing of production documents by the receiving party. Additionally, the parties agree  
 19 to reasonably accommodate one another’s requests for production of certain documents in  
 20 native format, such as financial information in native Excel format, to facilitate use by each  
 21 party and their experts.

22 Combined Opp’n, ECF No. 181 at 11 (citing Joint CMC Statement, ECF No. 38, at 8:8-15). The  
 23 agreement supports the approach of taxing costs associated with native productions and load files  
 24 and does not change the conclusion that other costs geared toward distilling data are not taxable  
 25 under section 1920(4).

26 The next sections analyze the line items for eBay and Microsoft.

#### 27 (a) *eBay*

28 As Kelora points out, eBay did not include actual invoices from Gallivan, Gallivan, and  
 O’Melia, LLC (“GGO”), which would have been better. The declarations and descriptions are  
 detailed, however, and the court can tell from eBay’s submissions of Gallivan invoices that the  
 summary in the declaration reflects the content of the invoices. *See* Combined Opp’n Ex. D, eBay

1 Case, ECF No. 181-1. The specific line items and outcomes are as follows:

2 “Production media” (\$1,200.00) is taxable because the media are the means of delivering the  
3 discovery. *See Plantronics*, 2012 WL 6761576, \*17.

4 “Production imaging” (\$22,450.00) is taxable because it is the electronic conversion tasks that  
5 are analogous to photocopying. The category includes compensable routine production tasks:  
6 electronic Bates stamping, de-blanking, the insertion of slip sheets and native file placeholders, and  
7 putting data on media. *See Plantronics*, 2012 WL 6761576, at \*12.

8 “Production Setup” (\$43,500.00) are costs of the document release to Kelora including load  
9 files and place holders for documents and ESI that the parties asked to receive in native file format.

10 “Source Code” (\$1,800.00) is taxable because the patent local rules mandate its presentation to  
11 Kelora for inspection. N.D. Cal. Patent L.R. 3-4(a); *see* Combined Opp’n Ex. D, eBay Case, ECF  
12 No. 181-1, ¶ 4.

13 Applying the presumption in favor of costs, the court also finds that the detail is sufficient to tax  
14 “Forensic Copy” (\$1,600.00) and “Nonstandard acquisition” (\$8,170.00) because they are tied to  
15 providing copies of the “most responsive documents.” “Pre-process data” (\$1,631.25) is about  
16 integrity of documents geared toward ultimate production and – while possibly geared toward a  
17 higher set of potentially responsive material – is a modest and necessary cost that the court –  
18 exercising its discretion – can tax.

19 The remaining categories are as follows: “Client Collection,” “Filter Post for Review,” and  
20 “Data Mining.” On this record, the court concludes that these are acts of collection and searching  
21 data by GGO (the gathering and processing of information) that the court – applying *Oracle* –  
22 found are not taxable. *See Plantronics*, 2012 WL 6761576 at \*16-17. As a separate ground, the  
23 court holds that eBay did not itemize the e-discovery processing costs with enough detail to  
24 establish that the court should award it any of the ESI processing costs. *See* Civ. L. R. 51(a)  
25 (affidavit and documentation must support each item claimed on the bill of costs); *see, e.g.,*  
26 Production Setup (references image placeholders). As the court said in *Plantronics*,

27 [T]he court’s view is that the capture, processing, and segregation of data in the in-house  
28 processing is separate from the TIFF conversion and appears to be the e-gathering and  
processing efforts that *Oracle America* disapproved. If any part of that process is closer to



the TIFF conversion process, conceivably some greater portion of the \$113,374.50 could be compensable. The court cannot tell whether this is so from the record and thus concludes that [the prevailing party] . . . did not establish sufficiently any ESI processing costs that it might recover.

2012 WL 6761576, at \*17. At the hearing, eBay said that the award of costs is “clerical.” A prevailing party still must show that the costs are taxable. *See Oracle Am.*, 2012 WL 3822129, at \*3. The court cannot tell from the submissions whether the expenses are taxable.

In sum, the court taxes total e-discovery costs of \$80,351.25.

**(b) Microsoft**

Microsoft’s e-discovery vendors billed \$18,077.73 for “the cost of making source code available for inspection . . . and for producing other documents in the format specified by Kelora.” *See Combined Opp’n Ex. E*, eBay Case, ECF No. 181-1, ¶ 8.

The court taxes the items bolded in the table totaling \$14,210.28. Some are processing costs (such as technical project management fees) but – given the presumption for taxation and the detail in the invoices – the court taxes the costs that have a nexus to specific productions. Applying the *Plantronics* analysis, the court does not award costs for e-gathering and processing efforts and also exercises its discretion because the invoices do not establish that the processing is taxable. *See Plantronics*. 2012 WL 5269667, at \*17

**2. Transcripts v. Video Depositions**

The second issue is whether eBay and Microsoft should receive the costs of the video depositions. The clerk taxed only written transcripts and disallowed video depositions. *See* ECF Nos. 171-72. The contested amount are \$3,823.00 for eBay and \$3,823.00 for Microsoft. eBay and Microsoft Motion to Review, ECF No. 175 at 5. Kelora does not dispute the math and argues that eBay and Microsoft ought to get one or the other, but not both. Kelora Opp’n, ECF No. 178.

Civil Local Rule 53(c)(1) states that the “cost of an original and one copy of any deposition (including video taped depositions) taken for any purpose in connection with a case is allowable.” The rule allows taxing of costs for video depositions. The Ninth Circuit has not addressed the issue. Recent Federal Circuit and district court decisions have permitted taxation of costs both for a stenographic transcript and a video deposition in appropriate circumstances. *See, e.g., In re Ricoh*,

661 F.3d at 1370 & n.5 (applying N.D. Cal. Civil L.R. 54-3(c)(1)); *Meier*, 2009 WL 982129, at \*1.<sup>2</sup>

Kelora argues that only stenographic exhibits were submitted as part of the summary judgment motions and thus video depositions were not necessary costs. Kelora Opposition, eBay Case, No. 178 at 4. Still, Civil Local Rule 54-3(c)(1) permits costs for depositions “taken for any purpose in connection with the case.” Some courts have rejected costs for video taping when costs for written transcripts were taxed. *See In re Ricoh*, 661 F.3d at 1370 n.5 (noting this).<sup>3</sup> In patent cases, costs for both have been allowed as “commonplace practice.” *See, e.g., id.* at 1370. The court taxes both as appropriate expenses here.

#### **E. Costs: Cabela’s Case (C 11-1398)**

The following table has the clerk’s taxed costs, the parties’ positions, and the court’s awards.

| <b>Cabela’s Costs By Category, Parties’ Positions, and Award (* denotes an undisputed cost)</b> |                    |                          |                           |              |
|---|--------------------|--------------------------|---------------------------|--------------|
| <b>§ 1920 Category</b>  | <b>Taxed Costs</b> | <b>Cabela’s Position</b> | <b>Keloria’s Position</b> | <b>Award</b> |
| Fees of the clerk*  | \$350.00           | \$350.00                 | \$350.00                  | \$350.00     |
| Service of summons and subpoenas*   | \$130.00           | \$130.00                 | \$130.00                  | \$130.00     |
| Fees for printed or electronically recorded transcripts   | \$12,516.10        | \$12,516.10              | \$8,754.75                | \$11,385.75  |
| Fees for exemplification and costs of making copies   | \$16,686.45        | \$16,686.45              | \$0.00                    | \$16,686.45  |
| Total   | \$29,682.55        | \$29,682.55              | \$9,234.75                | \$28,552.20  |

Kelora has two challenges: (1) e-discovery costs are not (a) substantiated by sufficient

<sup>2</sup> *See also Hynix Semiconductor v. Rambus Inc.*, 697 F. Supp. 2d 1139, 1150 (N.D. Cal. 2010); *Asyst Techs. v. Emtrak Inc.*, No. C 98-20451 JF, 2009 WL 668727, at \*2 (N.D. Cal. 2009); *Fresenius Medical Care Holdings, Inc. v. Baxter Intern.*, No. C 03-1431 SBA, 2008 WL 2020533, at \*6 (N.D. Cal. 2008); *Pixion Inc. v. Placeware Inc.*, No. C 03-02909 SI, 2005 WL 3955889, at \*2 (N.D. Cal. 2005); *MEMC Electronic Materials v. Mitsubishi Materials*, No. C-01-04925 SBA (JCS), 2004 WL 5361246 \*3-5 (N.D. Cal. 2004).

<sup>3</sup> *See also Affymetrix, Inc. v. Multilyte Ltd.*, No. C 03-03779 WHA, 2005 WL 2072113, at \*2 (N.D. Cal. Aug. 26, 2005); *ATS Products, Inc. v. Ghiorso*, No. C 10-4880 BZ, 2012 WL 1194151, at \*1, n.3 (N.D. Cal. Apr. 10, 2012) (allowing cost of either a written transcript or video); *Pierson v. Ford Motor Co.*, No. C 06-6503 PJH, 2010 WL 431883, at \*4 (N.D. Cal. Feb. 2, 2010).

supporting documentation or (b) compensable because the costs are attributable to pre-production processing; and (2) transcripts are not fully compensable because either (a) there was no prior court order authorizing the costs as recoverable or (b) Cabela's should get stenographic transcripts or the video depositions but not both. Motion, Cabela's Case, ECF No. 155 at 5.

### ***1. E-discovery Costs***

Cabela's spent \$16,646.45 for "reproducing, copying, and other document fees necessarily incurred in this case, including imaging and converting electronic documents for reproducing disclosure or formal discovery documents to Kelora." Sitrick Decl., Ex. G-1, ECF No. 181. Declarations from the law firm's in-house litigation technology specialists say that they "process[ed] and convert[ed] files received from Cabela's to be produced in discovery to load into the software program Summation for reviewing and processing and converting into production format." *Id.*, Kemper Decl. & Leftwich Decl., Ex. E-1 to Ex. G, ECF No. 181. The Kemper and Leftwich declarations list the amounts they spent on copying discovery: \$7,913.00 and \$5,540.00, respectively, totaling \$13,453.00. *Id.* Attached to their declarations are Invoices 1747767 and 1720152, which are billing summaries without any detail totaling \$20,094.00 (apparently showing that their work covered more than the \$13,453.00 in copying costs). Then, more invoices reflect copying costs totaling \$3,233.45. Ex. E-2 to Ex. G, ECF No. 181. This table shows the costs.

| <b>Cabela's Exemplification Costs By Category</b> |   |                   |
|---|---|-------------------|
| <b>Item</b>                                       | <b>Description</b>  | <b>Total Cost</b> |
| Q & B Inv. No. 1677408                            | Color copy and copy charges - Cabela's CD blowback (\$133.20 + \$12.90) | \$ 146.10         |
| Q & B Inv. No. 169076                             | Copy charges  | \$ 82.40          |
| Q & B Inv. No. 1702061                            | Copy charges  | \$ 271.90         |
| Q & B Inv. No. 1706581                            | Color copy and copy charges   | \$ 971.10         |
| Q & B Inv. No. 1727610                            | Copy charges  | \$ 437.20         |
| Q & B Inv. No. 1747767                            | Color copy and copy charges   | \$ 1,023.10       |
| Luce Forward Inv. No. 6708512                     | Photocopying  | \$ 8.85           |
| Luce Forward Inv. No. 6723169                     | Photocopying  | \$ 260.25         |

|                                  |              |                    |
|----------------------------------|--------------|--------------------|
| Luce Forward Inv. No.<br>6739486 | Photocopying | \$ 16.50           |
| Luce Forward Inv. No.<br>6744693 | Photocopying | \$ 16.05           |
| <b>Total</b>                     |              | <b>\$ 3,233.45</b> |

Kelora argues that this detail is not sufficient. The declarations are not very precise. Still, given the tethering by the information specialists of the “copying” to “discovery,” and given that the information arrived from Cabela’s to the law firm, where it was placed in the software program Summation, which is a document review platform, the court awards the \$13,453. The additional \$3,233.45 is for copying, and, given the presumption in favor of costs and counsel’s declaration that the costs “necessarily were obtained for use in the case,” it is not different than the declaration in *Meier*. See 2009 WL 982129, at \*2. Other cases have required more, but the nature of the case is such that the copying costs are relatively modest. The court awards them.

## 2. Transcripts

Cabela’s asked for \$15,084.66, and the clerk awarded \$12,516.10. Kelora says that the total amount should be \$8,754.75. Kelora Motion, Cabela’s case, ECF No. 155 at 17 and Ex. 1.

The court allows the cost of videotaping (including technician fees and the video) and one transcript. See *Plantronics*, 2012 WL 6761576 at \*7. The court disallows the following: (a) \$1,848.56 for expedited delivery charges, see *Asis Internet Services v. Optin Global, Inc.*, No. C-05-5124 JCS, 2008 WL 5245931, at \*6 (N.D. Cal. Dec. 17, 2008) (expedited delivery not taxable); *Affymetrix*, 2005 WL 2072113, at \*2 (same); (b) \$34.65 in conference calls, see *Intermedics*, 1993 WL 515879, at \*8; and (c) \$2,295.70 for extra transcripts.<sup>4</sup>

The court allows \$222.00 for the transcript from the summary judgment and non-infringement

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<sup>4</sup> \$2,295.70 is calculated as follows: Larsen: Condensed Transcript (\$27.50), E-cd (\$30.00), Color laser (87.00); Livenote (\$152.25), Rough Draft (\$130.50); Fortna Vol. 1: Condensed Transcript (\$27.50), E-cd (\$30.00); Fortna Vol. 2: Condensed Transcript (\$27.50), E-cd (\$30.00); Wynkoop: Condensed Transcript (\$27.50), E-cd (\$30.00); Kimbrough: Rough ASCII (\$325.00), CD Depo (\$39.00); Danish: Rough ASCII (\$364.00), CD Depo (\$39.00); Danish 30(b)(6): CD Depo (\$39.00), Rough ASCII (\$348.60); Gafford: Realtime (\$229.35), CD Depo (\$39.00); Pampinella: Realtime (\$234.00), CD Depo (\$39.00). See Combined Opp’n, Ex. G, ECF No. 181.

hearing. *See* Docket Entries, Cabela's Case, ECF Nos. 57, 98-99. Kelora argues that the court did not authorize the expense before it was incurred. Kelora Motion, ECF No. 155 at 17; *see* Civ. L.R. 54-3(b)(3) (cost of transcripts "is not normally allowable unless, before it is incurred, it is approved by a Judge or stipulated to be recoverable by counsel"). Nonetheless, courts allow costs for transcripts of important hearings. *See, e.g., Competitive Techs.*, 2006 WL 6338914, at \*6; *Affymetrix*, 2005 WL 2072113, at \*2 (transcripts in contentiously-litigated cases); *cf. Hynix Semiconductor*, 697 F. Supp. 2d at 1148-50 (disallowed costs for transcripts of relatively unimportant hearings regarding a motion to compel a deposition, a discovery dispute, and a motion for a protective order). After the hearing, the district court ordered additional discovery and briefing. *See* Order, Cabela's Case, ECF No. 98. Given that the transcript was likely important for drafting Cabela's supplemental brief, ECF No. 102, the court awards the costs.

The documentation is sufficient. Cabela's submitted invoices from litigation support providers, and the declaration states that the invoices were paid. *See* Combined Opp'n Ex. G., ECF No. 181.

The total taxed costs in this category are \$11,385.75.

#### **F. Costs: Target Case (C 11-1548)**

##### **1. Dell**

The following table has the clerk's taxed costs, the parties' positions, and the court's awards.

| <b>Dell Costs By Category and Parties' Positions</b> (* denotes an undisputed cost) |                    |                        |                          |              |
|---|--------------------|------------------------|--------------------------|--------------|
| <b>§ 1920 Category</b>  | <b>Taxed Costs</b> | <b>Dell's Position</b> | <b>Kelora's Position</b> | <b>Award</b> |
| Fees of the clerk*  | \$305.00           | \$305.00               | \$305.00                 | \$305.00     |
| Fees for printed or electronically recorded transcripts*                            | \$2,392.75         | \$2,392.75             | \$2,392.75               | \$2,392.75   |
| Fees for exemplification and the costs of making copies*                            | \$17,384.41        | \$17,384.41            | \$0.00                   | \$17,384.41  |
| Total   | \$20,082.16        | \$20,082.16            | \$2,697.75               | \$20,082.16  |

The following table has Dell's e-discovery costs.

| <b>Dell's Exemplification Costs By Category</b> |   |                    |
|---|---|--------------------|
| <b>Item</b>                                     | <b>Description</b>  | <b>Total Cost</b>  |
| Advanced Discovery Inv. No. B32014              | Tier 2 Processing: Includes metadata and text extraction with native file links (Bates Range: Numbered Per Custodian) (P400) RE: VOL 001  | <b>\$36.30</b>     |
| Advanced Discovery Inv. No. B32017              | Tier 2 Processing: Includes metadata and text extraction with native file links - per GB (P400-Linear)  | <b>\$44.00</b>     |
| Advanced Discovery Inv. No. B32034              | Tier 2 Processing: Includes metadata and text extraction with native file links VOL 004: THARGREAVES000000001 - 000083801) (P400, Linear)   | <b>\$5,095.20</b>  |
| Advanced Discovery Inv. No. B35156              | Tier 2 Processing: Includes metadata and text extraction with native file links - per GB (P400, Linear) (VOL005 - VOL009)   | <b>\$7,191.58</b>  |
| Advanced Discovery Inv. No. B39801              | Tier 2 Processing: Native File Processing: Includes metadata and text extraction with native file links - Linear Search - per GB (P400)   | <b>\$2,825.08</b>  |
| Advanced Discovery Inv. No. B39801              | Tier 4 Production: Electronic File Conversion - B&W; includes metadata and text extraction, image files and native file links - per GB; Includes up to DELL146821: (P600) Continuing hosting and user fees, professional services and technical time included at no additional charge per agreement | <b>\$2,192.25</b>  |
| <b>Total</b>                                    |   | <b>\$17,384.41</b> |

The Tier 4 charge for \$2,192.25 is for production, and it is taxable. The invoice reveals sufficiently what the vendor did, and the declaration establishes that Dell paid it.

The other charges are processing costs. The third charge for \$5,095.20 is linked to specific bates-stamped productions and reflects metadata and text with native file links, which are productions contemplated by the parties' ESI agreement. *See supra* page 13. The court awards it. The rest are also conversion and processing costs linked to the specific productions. The modest charges (.11 per page for the 162,000 pages) support the conclusion that the e-discovery costs are the electronic equivalent of copying. The court taxes the full \$17,384.41.

## **2. Newegg**

The following table has the clerk's taxed costs, the parties' positions, and the court's awards.

| <b>Newegg Costs By Category and Parties' Positions</b> (* denotes an undisputed cost) |                                |                          |                          |              |
|---|--------------------------------|--------------------------|--------------------------|--------------|
| <b>§ 1920 Category</b>  | <b>Taxed Costs<sup>5</sup></b> | <b>Newegg's Position</b> | <b>Kelora's Position</b> | <b>Award</b> |
| Fees of the clerk*  | \$855.00                       | \$855.00                 | \$855.00                 | \$855.00     |
| Fees for printed or electronically recorded transcripts*                              | \$9,953.31                     | \$9,953.31               | \$9,953.31               | \$9,953.31   |
| Fees for exemplification and costs of copies  | \$17,496.49                    | \$17,496.49              | \$1,538.39               | \$17,496.49  |
| Total   | \$28,304.80                    | \$28,304.80              | \$12,346.70              | \$28,304.80  |

The following table has Newegg's e-discovery costs.

| <b>Newegg's Exemplification Costs By Category</b> |  |                   |
|---|--|-------------------|
| <b>Item</b>                                       | <b>Description</b>   | <b>Total Cost</b> |
| Clicks Inv. No. 1149122                           | Imaging and Production<br>Hourly charge (load file creation): \$80.00<br>CD creation: \$26.85<br>Sales Tax: (\$8.31)   | \$115.16          |
| Clicks Inv. No. 1149950                           | Imaging and Production<br>Electronic Image Redaction (\$72.12)<br>Image OCR (\$108.18)<br>Image Endorse, NEGG 000001-003606 (\$36.06)<br>CD Creation (\$17.90)<br>Sales Tax (\$18.22)                              | \$252.48          |
| Clicks Inv. No. 1150034                           | Imaging and Production<br>Hourly Charge (Document Prep) multiple CDs (\$40.00)<br>Electronic Image Redaction (\$80.94)<br>Image Endorse, NEGG003607-7660 (\$40.47)<br>CD Creation (\$17.90)<br>Sales Tax (\$13.95) | \$193.26          |
| Clicks Inv. No. 1150380                           | Imaging and Production<br>Electronic Image Redaction (\$153.72)<br>Image Endorse (\$76.86)<br>CD Creation (\$17.90)<br>Sales Tax (\$19.33)   | \$267.81          |

<sup>5</sup> \$225.20 was for another case and is subtracted. Combined Opp'n, ECF No. 181 at 28, 33.



|                               |   |             |
|-------------------------------|---|-------------|
| Clicks Inv. No.<br>1152241    | Imaging and Production<br>Extract Images from Summation (\$80.00)<br>OCR Images (\$965.91)<br>Branding, NEGG018042 - 050238 (\$321.97)<br>DVD, 1 Summation, 1 Concordance (\$30.00)<br>CDs for loading into Summation, upload,<br>move into folders (\$80.00)<br>Sales Tax (\$114.95) | \$1,592.83  |
| Clicks Inv. No.<br>1152355    | Imaging and Production<br>Tech Time (load file creation) (\$40.00)<br>CD Creation (\$8.95)<br>Sales Tax (\$3.81)  | \$52.76     |
| Clicks Inv. No.<br>1152729    | Imaging and Production<br>Manually select docs from customer (\$40.00)<br>Match metadata and extracted text to loaded files<br>(\$80.00)<br>Redact old control numbers (\$118.76)<br>Branding (\$59.38)<br>Sales Tax (\$23.19)  | \$321.33    |
| Clicks Inv. No.<br>1153070    | Imaging and Production<br>Set up volumes for Summation (\$200.00)<br>Media Creation 1 DVD (\$8.95)<br>Sales Tax (\$16.25)   | \$225.20    |
| Clicks Inv. No.<br>1153773    | Imaging and Production<br>Tech Time (\$80.00)<br>CD/DVD creation (\$26.85)<br>Sales Tax (\$8.31)  | \$115.16    |
| e-Stet Inv. No.<br>L002081.01 | Imaging and Production<br>Native file processing (\$5,512.5)<br>Conversion to TIFF (\$10,400.00)<br>Technical services (\$875.00); USB drive (\$255.00)<br>Messenger (\$186.00); FedEx (\$132.00); Discount:<br>\$3,000.00  | \$14,360.50 |
| Total                         |   | \$17,496.49 |

Combined Opp'n Ex. J, ECF No. 181. The invoices show production costs that are taxable.

### 3. Amazon, Audible, and Zappos

The following table has the clerk's taxed costs, the parties' positions, and the court's awards.

| Amazon Costs By Category and Parties' Positions (* denotes an undisputed cost) |             |                   |                   |             |
|--|-------------|-------------------|-------------------|-------------|
| § 1920 Category  | Taxed Costs | Amazon's Position | Kelora's Position | Award       |
| Fees of the clerk*   | \$281.00    | \$281.00          | \$281.00          | \$281.00    |
| Fees for printed or electronically recorded transcripts*                       | \$11,231.29 | \$11,231.29       | \$11,231.29       | \$11,231.29 |



|   |              |              |             |             |
|---|--------------|--------------|-------------|-------------|
| Fees for exemplification and the costs of making copies | \$89,800.00  | \$89,800.00  | \$0.00      | \$16,745.10 |
| Total   | \$101,312.29 | \$101,312.29 | \$11,512.29 | \$28,257.39 |

The following table has Amazon's e-discovery costs.

| <b>Amazon's Exemplification Costs By Category</b> |  |                   |
|---|--|-------------------|
| <b>Item</b>                                       | <b>Description</b>   | <b>Total Cost</b> |
| Hudson Inv. No. 0295029-03A                       | 1st Pass Review, Project Management and Quality Control  | \$12,078.99       |
| eLit Inv. No. 17154                               | <b>eData to TIFF Conversion (\$137.50)</b><br><b>Data Management (\$218.75)</b><br><b>Sales Tax (\$33.84)</b>  | <b>\$390.09</b>   |
| eLit Inv. No. 18271                               | <b>Electronic Bates Numbering (\$41.17)</b><br>Data Filtering/Key Word Searching (\$16,800.00)<br><b>Edata Conversion to TIFF (\$6,600.00)</b><br><b>Data Management . . . (\$2,406.25)</b><br>Relativity Monthly Data Usage & Storage (\$638.80)<br>Monthly User Access Fee (\$300.00)<br><b>CDs Burned- Production (\$30.00)</b><br><b>Shipping Charges (\$93.78)</b><br>Sales Tax (\$2,556.45)  | \$29,466.45       |
| eLit Inv. No. 18558                               | <b>Electronic Bates Numbering (\$120.89)</b><br>Data Filtering/Keyword Searching (\$21,575.00)<br><b>Edata Conversion to TIFF (\$687.50)</b><br><b>Data Management (\$1,250.00)</b><br>Relativity Data Usage & Storage Fee (\$650.40)<br>User Access Fee (\$300.00)<br><b>CDs Burned - Production (\$30.00)</b><br><b>Shipping Charges (\$93.78)</b><br><b>Delivered on Hard Drive (\$350.00)</b><br>Zappos Travel Expenses (\$1,577.00)<br>Sales Tax (\$2,530.28) | \$29,164.85       |
| eLit Inv. No. 18890                               | Data Filtering/Key Word Searching (\$7,750.00)<br><b>Edata Conversion to TIFF (\$275.00)</b><br><b>Electronic Bates Numbering (\$74.17)</b><br><b>Data Management (\$2,031.25)</b><br>Relativity Data Usage & Storage Fee (\$693.20)<br>User Access Fee (\$600.00)<br><b>CDs Burned - Production (\$40.00)</b><br><b>CDs Duplicated (\$40.00)</b><br><b>Shipping Charges (\$291.55)</b><br>Sales Tax (\$1,120.54)  | \$12,915.71       |

|                     |  |                    |
|---------------------|--|--------------------|
| eLit Inv. No. 19235 | <b>Data Management - Processing (\$125.00)</b><br>Relativity Data Usage & Storage Fee (\$693.20)<br>User Access Fee (\$600.00)<br><b>Shipping Charge (\$59.40)</b><br>Sales Tax (\$140.37) | \$1,617.97         |
| eLit Inv. No. 19567 | <b>Data Management - Processing (\$125.00)</b><br>Relativity Data Usage & Storage Fee (\$693.20)<br>User Access Fee (\$600.00)<br>Sales Tax (\$134.73)                                     | \$1,552.93         |
| eLit Inv. No. 19878 | Relativity Data Usage & Storage Fee (\$693.20)<br>User Access Fee (\$500.00)<br>Sales Tax (\$113.35)   | \$1,306.55         |
| eLit Inv. No. 20133 | Relativity Data Usage & Storage Fee (\$693.20)<br>User Access Fee (\$500.00)<br>Sales Tax (\$113.35)   | \$1,306.55         |
| <b>Total</b>        |  | <b>\$89,800.09</b> |

Combined Opp'n Ex. K, ECF No. 181 at 40-48.

The bolded costs total \$15,292.33, they are related to production and include data management fees tied to specific productions, and the court awards them plus 9.5% tax for a total of \$16,745.10. The invoices are sufficient documentation. The other fees are processing, data gathering, and storage, and the invoices do not provide a basis for concluding that they are exemplification or copying. *See* Civil L. R. 51(a); *Plantronics*, 2012 WL 676156 at \*17.

#### 4. Costco

The following table has the clerk's taxed costs, the parties' positions, and the court's awards.

| <b>Costco Costs By Category and Parties' Positions</b> (* denotes an undisputed cost) |                    |                          |                          |              |
|---|--------------------|--------------------------|--------------------------|--------------|
| <b>§ 1920 Category</b>  | <b>Taxed Costs</b> | <b>Costco's Position</b> | <b>Kelora's Position</b> | <b>Award</b> |
| Fees of the clerk*  | \$281.00           | \$281.00                 | \$281.00                 | \$281.00     |
| Fees for printed or electronically recorded transcripts*                              | \$3,944.93         | \$3,944.93               | \$3,944.93               | \$3,944.93   |
| Fees for exemplification and the costs of making copies                               | \$30,987.24        | \$30,987.24              | \$4,000.00               | \$8,552.04   |
| Total   | \$35,213.17        | \$35,213.17              | \$8,225.93               | \$12,777.97  |

The next table shows Costco's e-discovery costs.

| <b>Costco's Exemplification Costs By Category</b> |  |                    |
|---|--|--------------------|
| <b>Item</b>                                       | <b>Description</b>   | <b>Total Cost</b>  |
| Kiersted Inv. No.<br>FJ2531108                    | Process Data - Output (Images): \$20.85<br>5% Discount: (\$1.04)<br>Sales Tax: \$1.31  | <b>\$21.12</b>     |
| Kiersted Inv. No.<br>FJ2531111                    | Process Data - Output Images: \$331.18<br>Data reduction (de-nist/de-dupe): \$56.70<br>10% Discount: (\$37.79)<br>Sales Tax: \$23.04   | <b>\$372.13</b>    |
| Kiersted Inv. No.<br>FJ2551111                    | Process Data – Output (Native): \$403.00<br>Process Data – Output (Images): \$701.95<br>Process Data – Data Reduction (De-nist/De-Dupe):<br>\$121.51<br>Discount 10%: (\$122.65)<br>Sales Tax: \$72.85   | <b>\$1,176.66</b>  |
| GGO - Inv. No. 1110081                            | Hosting Setup (DB): \$1,000.00<br>Large Collections (10-100 GB) (F, G, U, M and<br>Mail): \$2000.00<br>Large Collections (10-100 GB): \$2,000.00<br>Standard Matter Management @ 10%: \$500.00   | <b>\$5,500.00</b>  |
| GGO - Inv. No. 111021                             | DWR Monthly Fee, 258GBs: \$2,000.00<br>DWR Remote Hosting Colo Facility: \$500.00<br>Monthly EULA: \$350.00<br>Large Collections (10-100 GB); 57GBs: \$2,000.00<br><b>Production Setup: \$1,000.00</b><br><b>Native Production Export [bates range]:</b><br><b>\$1,000.00</b><br><b>TIFF Conversion and Endorse, Convert 2 GBs:</b><br><b>\$1000.00</b><br><b>Media Copy - DVD/CD 2 copies: \$50.00</b><br><b>Standard Matter Management 10% PM:</b><br><b>\$925.00</b><br><b>2 FedEx Fees: \$75.08</b><br>Sales Tax at 9.5%: \$356.25 | <b>\$10,706.33</b> |

|                        |   |                    |
|------------------------|---|--------------------|
| GGO - Inv. No. 1112020 | DWR SaaS/GB Hosting (up to 2 TBs): \$2,000.00<br>Secure co-location facility/connectivity: \$500.00<br>DWR monthly reviewer access fees: \$1,050.00<br><b>Production Setup - Costco-PDS004-000050164: \$1,000.00</b><br><b>TIFF conversion (convert, endorse, Bates stamp, OCR): \$750.00</b><br><b>Production Setup - Costco-PDS006, COS 0053330-53335: \$1000.00</b><br><b>TIFF conversion: \$750.00</b><br><b>Production media: \$400.00</b><br>Standard Matter Management @ 10%: \$745.00<br><b>FedEx fees: \$115.00</b><br>Sales Tax at 9.5%: \$327.75 | \$8,637.75         |
| GGO - Inv. No. 1201021 | Hosting Fees (up to 2 TBs): \$2,000.00<br>Secure co-location facility/connectivity: \$500.00<br>DWR monthly reviewer access fees: \$350.00<br>Sales tax at 9.5%: \$223.25   | \$3,073.25         |
| GGO - Inv. No. 1202023 | Secure co-location facility, server, connectivity fees  | \$500.00           |
| GGO - Inv. No. 1203019 | Secure co-location facility, server, connectivity fees  | \$500.00           |
| GGO - Inv. No. 1204020 | Secure co-location facility, server, connectivity fees  | \$500.00           |
| <b>Total</b>           |   | <b>\$30,987.24</b> |

Combined Opp'n Ex L, ECF No. 181.

The bolded costs in the Gallivan and Kiersted invoices total \$7,810.08, they relate to specific productions (and the court includes one \$925 matter management fee as an approximation of the 10% fee imposed), and with 9.5% tax total \$8,552.04. The other expenses in the Gallivan invoices generally are hosting expenses that the court does not award. The invoices do not provide enough detail about "large collections" expenses to allow a conclusion that the fees are for exemplification or copying. *See* Civil L. R. 51(a); *Plantronics*, 2012 WL 676156 at \* 17.

As to the Kiersted invoices, the services in the three invoices are related to processing images or native productions, which are recoverable costs. The prices support that conclusion too, as does a comparison to other fees that are not taxable (such as data hosting and co-location fees). Given the presumption for costs, the court finds the record sufficient to tax these costs.

1                   **5. HP**

2                   The following table has the clerk's taxed costs, the parties' positions, and the court's awards.

3                   **HP Costs By Category and Parties' Positions** (\* denotes an undisputed cost)

| 4                   § 1920 Category  | Taxed Costs | HP's Position | Kelora's Position | Award       |
|--|-------------|---------------|-------------------|-------------|
| 5                   Fees of the clerk*                                       | \$281.00    | \$281.00      | \$281.00          | \$281.00    |
| 6                   Fees for printed or electronically recorded transcripts* | \$5,315.90  | \$5,315.90    | \$5,315.90        | \$5,315.90  |
| 7                   Fees for exemplification and the costs of making copies  | \$74,133.40 | \$74,133.40   | \$3,913.60        | \$56,227.50 |
| 8                   Total  | \$79,730.30 | \$79,730.30   | \$9,510.50        | \$61,824.40 |

9                   The next table summarizes HP's e-discovery costs.

10                   **HP's Exemplification Costs By Category**

| 11                   Item                               | Description  | Total Cost |
|---|--|------------|
| 12                   Discover Ready - Inv. No. 21107004 | <b>Electronic Discovery for MEDIA001.001 to 001.003</b><br><b>Data Processing: \$348.00</b><br><b>Electronic Discovery: CD Vol. HPKE0001-0006:</b><br><b>Electronic Document Conversion: \$242.16</b><br><b>Load File Preparation: \$264.00</b><br><b>6 CDs: \$60.00</b><br><b>Electronic File Export - Natives: CDs HPKEN001, 002</b><br><b>Native File Export: \$98.00</b><br><b>Load File Prep: \$176.00</b><br><b>2 CDs: \$20.00</b><br>Hosting - HP Review Database: July 2011<br><b>Data Formatting and Loading: \$140.00</b><br>Data Hosting Monthly Charge: \$25.90<br>Per user charge: \$500.00 | \$1,874.06 |

|    |                                       |  |             |
|----|---------------------------------------|--|-------------|
| 1  | Discover Ready -<br>Inv. No. 21108004 | <b>Electronic Discovery for Media 00005-12, 14-16</b><br><b>Data Processing: \$2,232.00</b><br><b>Electronic Discovery: CD Vol. HPKE0007-0045</b><br><b>Electronic Document Conversion: \$13,601.00</b><br><i>Load File Prep: \$1,716.00</i><br><b>39 CDs: \$390.00</b><br><b>Electronic File Export - Natives: CD Vol.: HPKEN003-010</b><br><b>Native File Export: \$392.00</b><br><i>Load File Prep: \$704.00</i><br><b>8 CDs: \$80.00</b><br>Hosting - HP Review Database: Aug. 2011<br><i>Data Formatting and Loading: \$3,840.00</i><br>Data Hosting Monthly Charge: \$735.00<br>Per user charge: \$500.00<br><b>Productions: CD Vol. HPKE0003-0006, 0009</b><br><i>Production Data Set: \$236.00</i><br><b>Bates Number &amp; Electronic Conf Status: \$3.30</b><br><b>OCR Export: \$88.50</b><br><i>Load File Prep: \$143.00</i><br><b>1 CD: \$10.00</b><br><b>Production - Natives: CD Vol. HPCN0001</b><br><i>Production Data Set Processing: \$59.00</i><br><b>Native File Export \$49.00</b><br><i>Load File Prep: \$66.00</i><br><b>Freight Charges: \$18.48</b> | \$24,863.28 |
| 13 | Discover Ready -<br>Inv. No. 21109003 | <b>Electronic Discovery: Media 000011, 17-30</b><br><b>Data Processing: \$2,912.00</b><br><b>Electronic Discovery: CD Vol. HPKE0046-0080</b><br><b>Electronic Document Conversion: \$ 4,543.32</b><br><i>Load File Prep: \$1,540.00</i><br><b>35 CDs: \$350.00</b><br><b>Electronic File Export - Natives: CD Vol. HKEN011-020</b><br><b>Native file export: \$490.00</b><br><i>Load File Prep: \$880.00</i><br><b>10 CDs: \$100.00</b><br>Hosting - HP Review Database: Sept. 2011<br><i>Data formatting and Loading: \$2,100.00</i><br>Data Hosting: \$1,109.50<br>Per User Charge: \$500.00<br><b>Productions: CD Vol. HPKE0041, 0043, 0057-0058</b><br><i>Production Data Set: \$236.00</i><br><b>Bates number: \$37.82</b><br><b>OCR export: \$118.00</b><br><i>Load File Prep: \$187.00</i><br><b>CD: \$10.00</b><br><b>Production: Natives (CD Vol. HPCPN0002)</b><br><i>Production data set processing: \$59.00</i><br><b>Native File Export: \$49.00</b><br><i>Load File Prep: \$66.00</i><br><b>Freight charges: \$18.56</b>                                       | \$15,306.20 |

|    |                                       |   |            |
|----|---------------------------------------|---|------------|
| 1  | Discover Ready -<br>Inv. No. 21110003 | <b>Electronic Discovery: Media 000031-000032</b><br><i>Data processing: \$328.00</i><br><b>Electronic Discovery: HPKE0081-0085</b><br><b>Electronic document conversion: \$380.52</b><br><i>Load File Prep: \$220.00</i><br><b>5 CDs: \$50.00</b><br><b>Electronic File Export - Natives: CD Vol.: HPKEN021-022)</b><br><b>Native File Export: \$98.00</b><br><i>Load File Prep: \$176.00</i><br><b>2 CDs: \$20.00</b><br>Hosting - HP Review Database: Sept. 2011<br><i>Data Formatting and Loading: \$900.00</i><br>Data Hosting: \$1,267.00<br>Per user charge: \$500.00<br><b>Productions: CD Vol.: HPCP0003-0006</b><br><i>Production Data Set \$944.00</i><br><b>Bates Numbering: \$505.98</b><br><b>OCR Export: \$472.00</b><br><i>Load File Prep: \$748.00</i><br><b>4 CDs: \$40.00</b><br><b>2 DVDs: \$20.00</b><br><b>Production - Natives: CD Vol. HPCPN0003-0004</b><br><i>Production Data Set Processing: \$118.00</i><br><b>Native File Export: \$98.00</b><br><b>2 DVDs: \$20.00</b><br><i>Load File Prep: \$132.00</i><br><b>Freight Charges: \$38.08</b> | \$7,075.58 |
| 14 | Discover Ready -<br>Inv. No. 21111003 | <b>Electronic File Export - Natives: CD Vol. HPKN0001</b><br><b>Native File Export: \$49.00</b><br><i>Load File Prep: \$88.00</i><br><b>CD: \$10.00</b><br>Hosting - HP Review Database: Nov. 2011<br><i>Data Formatting and Loading: \$920.00</i><br>Data Hosting Monthly Charge: \$1,428.00<br>Per user charge: \$500.00<br><b>Productions: CD Vol. HPCP0007-HPCP0015</b><br><i>Production data set: \$2,124.00</i><br><b>Bates numbering: \$1,082.82</b><br><b>OCR Export: \$295.00</b><br><i>Load File Prep: \$539.00</i><br><b>DVD: \$20.00</b><br><b>OCR: \$0.08</b><br><b>Production - Natives: CD Vol. HPCPN0005</b><br><i>Production Data Set Processing: \$59.00</i><br><b>Native file Export: \$49.00</b><br><b>DVD: \$10.00</b><br><i>Load File Prep: \$66.00</i><br><b>Freight Charges: \$36.80</b>  | \$7,276.70 |
| 25 | Discover Ready -<br>Inv. No. 21112004 | Hosting - HP Review Data Base: Dec. 2011<br>Data Hosting Monthly Charge: \$1,428.00<br>Per user charge: \$500.00  | \$1,928.00 |



|    |                                       |  |            |
|----|---------------------------------------|--|------------|
| 1  | Discover Ready -<br>Inv. No. 21200003 | <b>Electronic File Export - Native: CD Vol. HPKN0002</b><br><b>Native File Export: \$49.00</b><br><b>Load File Prep: \$88.00</b><br><b>CD: \$10.00</b><br>Hosting - HP Review Database: Jan 2012<br><b>Data Formatting and Loading: \$920.00</b><br>Data Hosting: \$1,589.00<br>Per user charge: \$500.00<br><b>Freight charges: \$19.23</b>   | \$3,175.23 |
| 2  |                                       |  |            |
| 3  |                                       |  |            |
| 4  |                                       |  |            |
| 5  | Discover Ready -<br>Inv. No. 21202002 | Electronic Discovery: Media000033-000036<br><b>Data Processing: \$96.00</b><br><b>Electronic Discovery: CD Vol. HPKE0086-0090</b><br><b>Electronic Document Conversion: \$200.36</b><br><b>Load File Prep: \$220.00</b><br><b>5 CDs: \$50.00</b><br><b>Electronic File Export - Natives: CD Vol. HPKEN023-024</b><br><b>Native File Export: \$98.00</b><br><b>Load File Prep: \$176.00</b><br><b>2 CDs: \$20.00</b><br>Hosting - HP Review Database: Feb. 2012<br><b>Data Formatting and Loading: \$140.00</b><br>Data Hosting: \$1,613.50<br>Per user charge: \$500.00<br><b>Productions: CD Vol. HPCP0003, 0016-0019</b><br><b>Production Data Set: \$944.00</b><br><b>Bates numbering: \$109.24</b><br><b>OCR: \$0.04</b><br><b>OCR Export: \$265.50</b><br><b>Load File Prep: \$473.00</b><br><b>4 CDs: \$40.00</b><br><b>1 DVD: \$10.00</b><br><b>Production - Natives: CD Vol. HPCPN0003, 0006-0007</b><br><b>Production Data Set Processing: \$118.00</b><br><b>Native File Export: \$98.00</b><br><b>Load File Prep: \$176.00</b><br><b>Freight Charges: \$37.62</b> | \$5,385.26 |
| 6  |                                       |  |            |
| 7  |                                       |  |            |
| 8  |                                       |  |            |
| 9  |                                       |  |            |
| 10 |                                       |  |            |
| 11 |                                       |  |            |
| 12 |                                       |  |            |
| 13 |                                       |  |            |
| 14 |                                       |  |            |
| 15 |                                       |  |            |
| 16 |                                       |  |            |
| 17 |                                       |  |            |
| 18 |                                       |  |            |



|    |                                       |  |                    |
|----|---------------------------------------|--|--------------------|
| 1  | Discover Ready -<br>Inv. No. 21203001 | <b>Electronic Discovery: Media 000037-000038</b><br><b>Data processing: \$156.00</b><br><b>Electronic Discovery: CD Vol. HPKE0091-0093</b><br><b>Electronic Doc Conversion: \$168.84</b><br><i>Load File Prep: \$132.00</i><br><b>3 CDs: \$30.00</b><br><b>Electronic File Export - Natives: CD Vol. HPKN0003-0004</b><br><b>Native File Export: \$98.00</b><br><i>Load File Prep: \$176.00</i><br><b>2 CDs: \$20.00</b><br><b>Electronic File Export - Natives: CD Vol. HPKEN025-026</b><br><b>Native File Export: \$98.00</b><br><i>Load File Prep: \$176.00</i><br><b>2 CDs: \$20.00</b><br>Data Hosting - HP Review Database: Mar. 2012<br><i>Formatting and Loading: \$180.00</i><br>Data Hosting: \$1,645.00<br>Per user charge: \$500.00<br><b>Productions: CD Vol. HPCP0020-0022</b><br><i>Production data set: \$708.00</i><br><b>Bates numbering: \$87.32</b><br><b>OCR Export: \$177.00</b><br><i>Load File Prep: \$297.00</i><br><b>3 CDs: \$30.00</b><br><b>Production - Natives: CD Vol. HPCPN0008-0009</b><br><i>Production Data Set Processing: \$118.00</i><br><b>Native File Export: \$98.00</b><br><i>Load File Prep: \$132.00</i><br><b>Freight charges: \$56.93</b> | \$5,104.09         |
| 15 | Discover Ready -<br>Inv. No. 21204003 | Hosting - HP Review Database: Apr. 2012<br>Data Hosting: \$1,645.00<br>Per user charge: \$500.00   | \$2,145.00         |
| 17 | <b>TOTAL</b>                          |  | <b>\$74,133.40</b> |

Combined Opp'n Ex. M, ECF No. 181.

The court awards the bolded costs, which total \$56,227.50. All costs are tied to specific productions and are analogous to making a copy. Native file export also is compensable, and the parties' ESI agreement contemplated native file production. *See supra* page 13. As discussed in the previous sections, the court does not tax hosting fees or user charges. As part of these taxed costs, the court includes production data set processing, load file fees, and data loading (italicized and bolded) tied to specific productions. The parties contemplated production with load files in their ESI agreement, and one cannot read the data without the load files.

#### **6. Office Depot**

The following table has the clerk's taxed costs, the parties' positions, and the court's awards.

| <b>Office Depot Costs By Category and Parties' Positions</b> (* denotes an undisputed cost) |                    |                                |                          |                    |
|---|--------------------|--------------------------------|--------------------------|--------------------|
| <b>Category</b>   | <b>Taxed Costs</b> | <b>Office Depot's Position</b> | <b>Kelora's Position</b> | <b>Award</b>       |
| Fees of the clerk*  | \$281.00           | \$281.00                       | \$281.00                 | \$281.00           |
| Fees for printed or electronically recorded transcripts*                                    | \$3,914.67         | \$3,914.67                     | \$3,914.67               | \$3,914.67         |
| Fees for exemplification and the costs of making copies.                                    | \$24,842.08        | \$24,842.08                    | \$1,840.38               | \$16,906.81        |
| <b>Total</b>  | <b>\$29,037.75</b> | <b>\$29,037.75</b>             | <b>\$6,036.05</b>        | <b>\$21,102.48</b> |

The next table summarizes Office Depot's e-discovery costs.

| <b>Office Depot's Exemplification Costs By Category</b> |   |   |
|---|---|---|
| <b>Item</b>   | <b>Description</b>  | <b>Total Cost</b>                             |
| CSI   | Hard Drive  | <b>\$324.75</b>                               |
| Discovery Ready<br>Inv. No. 21108071                    | <b>Electronic Document Conversion: Media 0001, 0003-0006</b><br><b>Data Processing: \$24.00</b><br><b>Electronic Document Conversion: CD Vol. ODKT0001</b><br><b>Convert Tagged Documents to TIFF images: \$6.84</b><br><b>Hosting - Office Depot Review Database: Aug. 2011</b><br><b>One-time Data Loading: \$20.00</b><br><b>Monthly Hosting: \$3.50</b><br><b>Productions: CD Vol. ODIP0001</b><br><b>Prepare Production: conflicts checking, bates stamping; confidentiality designations, redactions: \$6.84</b><br><b>Data Formatting with load files: \$75.00</b><br><b>Master CD: \$25.00</b><br><b>Production Natives: CD Vol. ODIPN0001</b><br><b>Produce selected native files: \$0.10</b><br><b>Data formatting: \$75.00</b><br><b>Load CDs to hard drive: \$15.00</b> | <b>\$251.28</b>                               |
| Discovery Ready<br>Inv. No. 21109070                    | <b>Electronic Doc. Conversion: Media 0008-0010, 2001-02</b><br><b>Data Processing: \$5,724.00</b><br><b>Electronic Doc. Conversion: CD Vol. ODKT0002-0007</b><br><b>Convert tagged documents to TIFF images: \$9.32</b><br><b>Hosting - Office Depot Review Database: Sept. 2011</b><br><b>One time Data Loading: \$4,060.00</b><br><b>Monthly Hosting: \$780.50</b>  | <b>\$10,573.82</b><br><br><b>[\$9,793.32]</b> |

|   |                                      |   |                                     |
|---|--------------------------------------|---|-------------------------------------|
| 1<br>2<br>3<br>4<br>5<br>6<br>7<br>8<br>9<br>10<br>11<br>12 | Discovery Ready<br>Inv. No. 21110070 | <b>Electronic Document Conversion: Media 00012</b><br><b>Data Processing \$4.00</b><br><b>Electronic Document Conversion: CD Vol. ODKT0008-0009</b><br><b>Convert tagged documents to TIFF images: \$972.56</b><br>Hosting - Office Depot Review Database: Oct. 2011<br><b>One-time Data Loading: \$900.00</b><br>Monthly Hosting: \$938.00<br><b>Productions: CD Vol. ODIP0002-0008</b><br><b>Prepare Production: conflicts checking, bates stamping; confidentiality designations, redactions: \$986.96</b><br><b>Data formatting for databases: format data with load files: \$525.00</b><br><b>3 master CDs: \$75.00</b><br><b>Load CDs to hard drive: \$105.00</b><br><b>Production Natives: CD Vol. ODIPN0002-0004</b><br><b>Produce selected native files: \$119.30</b><br><b>Data formatting for requested database, format data with load files: \$225.00</b><br><b>Load CDs to hard drive: \$45.00</b><br><b>Freight charges: \$18.40</b> | \$4,896.22<br>[ <b>\$3,958.20</b> ] |
| 13<br>14<br>15<br>16<br>17<br>18<br>19                      | Discovery Ready<br>Inv. No. 21111063 | Hosting - Office Depot Review Database: Nov. 2011<br>Monthly Hosting: \$938.00<br><b>Productions: CD Vol. ODIP009</b><br><b>Prepare Production: conflicts checking, bates stamping; confidentiality designations, redactions: \$0.04</b><br><b>Data Formatting with load files: \$75.00</b><br><b>Master CD: \$25.00</b><br><b>Production Natives: CD Vol. ODIPN0005</b><br><b>Produce selected native files: \$0.10</b><br><b>Data formatting for database: format data with load files: \$75.00</b><br><b>Load CDs to hard drive: \$15.00</b><br><b>Freight charges: \$17.03</b>  | \$1,145.17<br>[ <b>\$207.17</b> ]   |

|   |                                      |   |   |
|---|--------------------------------------|---|---|
| 1<br>2<br>3<br>4<br>5<br>6<br>7<br>8<br>9<br>10<br>11 | Discovery Ready<br>Inv. No. 21112070 | <b>Electronic Document Conversion: CD Vol. ODKT0040-0053</b><br><b>Convert tagged docs to TIFF images: \$491.80</b><br>Hosting - Office Depot Review Database: Dec. 2011<br><b>One-time Data Loading: \$400.00</b><br>Monthly Hosting: \$992.95<br><b>Productions: CD Vol. ODIP0010-11</b><br><b>Prepare production: conflicts checking, bates stamping; confidentiality designations, redactions: \$489.36</b><br><b>Data formatting for databases: format data with load files: \$150.00</b><br><b>Master CDs: \$25.00</b><br><b>Load CDs to hard drive: \$30.00</b><br><b>Production Natives: CD Vol. ODIPN0006</b><br><b>Produce selected native files: \$0.50</b><br><b>Data formatting for databases: format data with load files: \$75.00</b><br><b>Load CDs to hard drive: \$15.00</b><br><b>Freight charges: \$18.40</b> | \$2,688.01<br><br>[ <b>\$1,695.06</b> ] |
| 12<br>13<br>14<br>15<br>16<br>17                      | Discovery Ready<br>Inv. No. 21201065 | Hosting - Office Depot Review Database: Jan. 2012<br><b>One-time Data Loading: \$20.00</b><br>Monthly Hosting Charge: \$996.45<br><b>Productions: CD Vol. ODIP0012-13</b><br><b>Prepare production: conflicts checking, bates stamping, confidentiality designations, redactions: \$3.08</b><br><b>Data formatting for databases: format data with load files: \$150.00</b><br><b>Master CDs: \$25.00</b><br><b>Load CDs to hard drive: \$30.00</b><br><b>Freight charges: \$19.23</b>  | \$1,243.76<br><br>[ <b>\$227.31</b> ]   |
| 18<br>19<br>20<br>21<br>22<br>23<br>24<br>25<br>26    | Discovery Ready<br>Inv. No. 21202078 | Hosting - Office Depot Review Database: Feb. 2012<br>Monthly Hosting Charges: \$996.45<br>Monthly User Charge: \$100.00<br><b>Productions: CD Vol. ODIP0014-15</b><br><b>Prepare Production: conflicts checking, bates stamping, confidentiality designations, redactions: \$0.60</b><br><b>Data formatting for databases, format data with load files: \$150.00</b><br><b>Master CDs: \$50.00</b><br><b>Production Natives: CD Vol. ODIPN0007-08</b><br><b>Produce selected native files: \$1.50</b><br><b>Data Formatting for databases, format data with load files: \$150.00</b><br><b>Master CDs: \$25.00</b><br><b>Load CDs to hard drive: \$15.00</b><br><b>Freight charges: \$37.62</b>   | \$1,526.17<br><br>[ <b>\$429.72</b> ]   |
| 27<br>28  | Discovery Ready<br>Inv. No. 21203063 | Hosting - Office Depot Review Database: Mar. 2012<br>Monthly Hosting Charge: \$996.45<br>Monthly User Charge: \$100.00  | \$1,096.45                              |

|                                      |   |  |
|--------------------------------------|---|--|
| Discovery Ready<br>Inv. No. 21204071 | Hosting - Office Depot Review Database: Apr. 2012<br>Monthly hosting charges: \$996.45<br>Monthly User Charge: \$100.00 | \$1,096.45                                 |
| <b>Total</b>                         |   | <b>\$24,842.08</b><br><b>[\$16,906.81]</b> |

Combined Opp'n Ex N, ECF No. 181. The court awards the bolded costs totaling \$16,906.81 as exemplification and copying costs. The rest are hosting fees that are not taxable.

### 7. Target

The following table has the clerk's taxed costs, the parties' positions, and the court's awards.

| <b>Target Costs By Category and Parties' Positions</b> (* denotes an undisputed cost) |                    |                          |                          |                   |
|---|--------------------|--------------------------|--------------------------|-------------------|
| <b>Category</b>   | <b>Taxed Costs</b> | <b>Target's Position</b> | <b>Kelora's Position</b> | <b>Award</b>      |
| Fees of the clerk*  | \$281.00           | \$281.00                 | \$281.00                 | \$281.00          |
| Fees for printed or electronically recorded transcripts*                              | \$7,488.30         | \$7,488.30               | \$7,488.30               | \$7,488.30        |
| Fees for exemplification and the costs of making copies                               | \$684.86           | \$684.86                 | \$0.00                   | \$684.86          |
| <b>Total</b>  | <b>\$8,454.16</b>  | <b>\$8,454.16</b>        | <b>\$7,769.30</b>        | <b>\$8,454.16</b> |

The next table summarizes Target's e-discovery costs.

| <b>Target's Exemplification Costs By Category</b> |  |                   |
|---|--|-------------------|
| <b>Item</b>                                       | <b>Description</b>   | <b>Total Cost</b> |
| Kiersted Inv. No. FJ2551108                       | Process Data - Data Reduction (De-nist, de-dupe): \$1.31<br>Process Data - Output (Images): \$14.60<br>5% discount \$0.80<br>Sales Tax: \$1.00 | \$16.11           |
| Kiersted Inv. No. FJ2551112                       | Process Data - Output (Images - TIFF): \$218.50<br>10% discount: \$21.85<br>Sales Tax: \$15.86   | \$256.21          |
| Kiersted Inv. No. FJ2551201                       | Process Data - Output (Images): \$375.30<br>Sales Tax: \$24.77   | \$400.07          |
| Kiersted Inv. No. FJ2551202                       | Process Data - Output (Images): \$6.95<br>Process Data - Output (TIFF images): \$4.75<br>Sales Tax: \$0.77                                     | \$12.47           |
| <b>Total</b>                                      |  | <b>\$684.86</b>   |

1 Combined Opp'n Ex O, ECF No. 181.

2 The declaration establishes that the invoices all are for reproducing discovery. The invoices on  
3 their face show that they involve output in the form of TIFF images, which is a production format  
4 contemplated by the parties in their ESI agreement. *See supra* page 13. Kelora argues that this  
5 detail is not sufficient. As the court held with the Kiersted invoices for Costco, the costs are for  
6 copying (not processing), and given the presumption in favor of costs and counsel's declaration, the  
7 documentation is sufficient.

8 **CONCLUSION**

9 The court taxes the costs in the chart in the introduction.

10 In Case No. 10-4947 CW (LB), this disposes of ECF Nos. 173-75.

11 In Case No. 11-1398 CW (LB), this disposes of ECF No. 155.

12 In Case No. 11-1548 CW (LB), this disposes of ECF Nos. 515-521.

13 **IT IS SO ORDERED.**

14 Dated: April 5, 2013

15   
16 LAUREL BEELER  
17 United States Magistrate Judge  
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